82-460

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ALEXANDER L. STEVAS,
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

HOWARD CLAYTON DUNNING,

Petitioner,

vs.

SUPERIOR COURT IN AND
FOR CONTRA COSTA COUNTY,

Respondent.
_____/

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF CALIFORNIA

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Question Presented

1. Whether California courts may impose in personam jurisdiction under Sec. 410.10 Code of Civil Procedure over a nonresident husband without violating the Due Process Clause of the Fourteenth Amendment where, prior to the filing of the Petition for Dissolution by the wife, neither party had resided in California for more than two years.

No._____

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October Term, 1982

HOWARD CLAYTON DUNNING,

Petitioner,

vs.

SUPERIOR COURT IN AND
FOR CONTRA COSTA COUNTY,

Respondent

PETITION FOR HEARING ON WRIT OF
MANDATE TO THE SUPREME COURT
OF THE STATE OF CALIFORNIA

The Petitioner, Howard Clayton Dunning, respectfully prays that a writ of certiorari issue to review the denial of a Petition for Hearing on a Writ of Mandate by the Supreme Court of the State of California.

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Opinions Below

None of the opinions below were reported. The California Supreme Court summarily denied the Petition for Writ of Mandate on June 16, 1982. (See page 6 of the Appendix.) Likewise no opinion was rendered by the Court of Appeal for the First Appellate District, State of California in denying the request for a Writ of Mandate on April 27, 1982. (See page 5 of the Appendix.) A copy of the Notice of Intended Decision of the Superior Court of Contra Costa County, State of California appears at pages 1 through 2 of the appendix. The denial of the Motion to Quash Summons by said Superior Court appears at page 3 through 4 of the Appendix.

Jurisdiction

The decision of the California Supreme Court was filed on June 16, 1982. This Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1257(3).

Constitutional Provisions And Statute Involved

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part: "No State shall...deprive any person of life, liberty or property, without due process of law..."

The California Code of Civil Procedure Section 410.10 provides in pertinent part: "A court of this State may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States."

Statement of the Case

Petitioner (Mr. Dunning) and Real Party in Interest (Mrs. Dunning) were living in Canada at the time of their separation in late 1980. They had for a period of some sixteen (16) years, along with their two daughters, resided in California before moving to Canada in 1977. The parties purchased a house in Calgary, Canada in 1978.

In August 1980, Mrs. Dunning informed Petitioner that she wanted a divorce. She left for California, accompanied by her two daughters, one who was then 19 years old (over the age of majority). In September 1980, Mr. Dunning moved from Canada to Colorado where he still resides.

In Canada before separating, the parties had verbally agreed to a settlement that would include spousal and child support. Mr. Dunning later had

the agreement set to writing by an attorney in Colorado and forwarded it to Mrs. Dunning in California. He has also continually sent her at least $1,200.00 per month for her support from October 1980 to the present.

In February 1981, Mrs. Dunning filed in Superior Court in California for a dissolution of her marriage to Mr. Dunning, and she requested custody of the then only remaining minor child, Kimberly (she turned age eighteen three months later), spousal and child support. Mr. Dunning was initially served in Colorado and has never filed a Response, maintaining that California courts lack personal jurisdiction over him regarding this matter.

Repeated attempts to negotiate settlement were entered into with his wife and her attorney, both in person and through the mails. Hearing dates

for temporary orders were continued several times by her attorney. Mr. Dunning, present at the request of his wife's attorney, acquiesced in open court to his wife's request for another continuance of the proceedings on June 15, 1981, pending further settlement talks. The sole reason for his presence in court on that day was to cooperate with Mrs. Dunning's attorney and not to submit himself to the court's jurisdiction.

In September, 1981, Mr. Dunning, through his current California attorney, filed a motion to quash service of the dissolution papers pursuant to Section 418.10, Subdivision (a)(1) of the California Code of Civil Procedure, which provides:

> "(a) A defendant, on or before the last day of his time to plead or within such further time as the court may for good cause allow, may serve and file a notice of motion either or both:

(1) To quash service of summons on the ground of lack of jurisdiction of the court over him."

Mr. Dunning argued, inter alia, that the service of the summons should be quashed on the ground that to allow California to have in personam jurisdiction over Mr. Dunning would violate the Due Process Clause of the Fourteenth Amendment. Following a denial of the motion by the California Superior Court, Mr. Dunning petitioned first the Court of Appeal of California and then the Supreme Court of California raising, inter alia, again that the Due Process Clause precluded California from subjecting Mr. Dunning to its jurisdiction.*

*At pages 10-12 of petitioner's Petition for hearing to the Supreme Court of California, he argues, inter alia, that in order for California to have in personam jurisdiction over him, he must have certain "minimum contacts" with California such that he purposefully derives some benefit from activities in the state or intentionally engages in wrongful activity outside the state causing injury within the state. He cited Kulko v. Superior Court (1977) 436 U.S. 84, in support of these propositions and repeatedly asserts the basic unfairness of allowing California to have in personam jurisdiction over him.

The trial court, though it specifically recognized that his June 15, 1981, appearance was not a general appearance, thus not subjecting him to the court's jurisdiction, denied the motion. (See page 1 through 2, Appendix.) On February 9, 1982, Respondent-Superior Court entered its order denying the motion. (See page 3, Appendix.)

On February 24, 1982, Mr. Dunning filed a petition for writ of mandate with the Court of Appeal, First Appellate District, Division One, seeking an order to Respondent-Court to quash the service. On April 27, 1982, the Court of Appeals summarily denied the petition for writ of mandate and for a stay of all proceedings.

On May 6, 1982, Mr. Dunning filed a Petition for Hearing on a writ of mandate

with the California Supreme Court, seeking review of the Court of Appeal's denial of his petition for a writ of mandate and stay of proceedings. On June 16, 1982, the California Supreme Court summarily denied a hearing in this matter.

Reasons for Granting the Writ

I. California's Construction of C.C.P. Section 410.10 Denies Petitioner's Right to Due Process of Law as Guaranteed by the Fourteenth Amendment.

This Court has long held that in order to subject a nonresident to in-personam jurisdiction, due process requires that he have certain minimum contacts with the state "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " International Shoe Co. v. State of Washington (1945) 326 US 310 at 316, quoting Milliken v. Myer (1940) 311 US 457.

The U. S. Supreme Court has described the outer limits of traditional notions of fair play and substantial justice stating:

> "The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws...." Hanson v. Denckla, (1958) 357 U.S. 235 at 253.

California's long-arm statute, C.C.P. Section 410.10 provides:

> "A court of this State may exercise jurisdiction on any basis not inconsistent with the Constitution of this State or of the United States."

The U. S. Supreme Court stated in Kulko v. California Superior Court (1977) 436 U.S. 84 at page 92, that the "minimum contacts" test of International Shoe requires that the facts of each case be

weighed to determine whether the requisite "affiliating circumstances" are present.

In Kulko, supra, the husband and wife had lived in New York City. Following their separation, the wife moved to California. Pursuant to a written separation agreement, the children were to remain with the husband and would visit the wife at specific times during the year. The husband also agreed to pay a certain amount of support per child while they were in the wife's custody. At some point, one of the children decided that she wanted to live with her mother. Husband purchased a one-way plane ticket to California for the child to live with her mother. Thereafter, the child remained in the custody of the wife and visited the husband only periodically. In holding that California could not obtain personal jurisdiction over the father,

the U.S. Supreme Court stated,

> "A father who agrees, in the interests of family harmony and his children's preferences, to allow them to spend more time in California than was required under a separation agreement can hardly be said to have 'purposefully availed himself' of the 'benefits and protections' of California's laws." Kulko, supra, at 94.

The Court in Kulko concluded that since the defendant-father had not inflicted personal injury upon property or persons in California or participated in commercial transactions, California could not obtain personal jurisdiction over him. Kulko, supra, at pages 96-97.

Certainly the present case falls squarely within the holding in Kulko. The facts before the Superior Court as stated in the declarations of the parties in support of and in opposition to the motion to quash are: (1) that the parties lived in California until December 1977 when they moved to Calgary,

Canada; (2) they purchased a house in Calgary in 1978; (3) in August 1980, the parties separated and Mrs. Dunning moved to California where she now resides; (4) in September 1980, Petitioner moved to Colorado where he now resides; (5) from October 1980, to the present, Petitioner has provided $1,200/mo. in support to Mrs. Dunning; (6) in February 1981, Mrs. Dunning filed for divorce in Contra Costa County Superior Court, California; (7) the younger daughter became 18 years old (age of majority) in May 1981.

In view of the above facts (and considering the trial court's finding that no general appearance was made by petitioner on June 15, 1981), the trial court's order, if sustained, would "sanction a result that is neither fair, just nor reasonable." Kulko, 436 U.S. at 92.

Short personal visits to California are insufficient contacts to give it in personam jurisdiction. Kulko, supra, at page 94. California law is in accord on this issue. Bartlett v. Superior Court (1978) 86 Cal. App. 3d 72. Nor has Mr. Dunning intentionally engaged in any wrongful activity outside California, causing injury or an effect in California. Petitioner concedes for argument purposes that if a husband abandons his wife and children without financial support and therefore compels them to journey to California, and seek welfare assistance there, the husband may have acted wilfully and purposefully to cause a harmful effect in California. McGlothen v. Superior Court (1981) 121 Cal. App. 3d 106; In re Marriage of Lontos (1979) 89 Cal. App. 3d 61.

However, in the case at bar, Mr. Dunning did not abandon his family.

Mrs. Dunning decided to divorce Petitioner while they both lived in Canada. They had a home in Canada that she could have remained in. She also could have moved to Colorado with Petitioner, but instead decided to move to California. The choice was hers alone.

A set of circumstances similar to the case at bar arose in Hoerler v. Superior Court (1978) 85 Cal. App. 3d 533, where the Court granted a writ of mandate, citing Kulko as controlling:

> "[N]otwithstanding California is the marriage domicile and the state in which the parties resided most of their married lives, we think jurisdiction cannot be invoked on the record before us. As said by the United States Supreme Court in Kulko, supra; 'It cannot be disputed that California has substantial interests in protecting resident children and in facilitating child support actions on behalf of those children. But these interests simply do not make California a 'fair forum,' (citation), in which to require

> appellant, who derives no personal or commercial benefit from his child's presence in California and who lacks any other relevant contact with the State, either to defend a child support suit or to suffer liability by default.'" Hoerler, supra, at 570, quoting Kulko, supra, 98 S. Ct. at 1701.

This principle is even clearer in our case since both of the children are now over the age of 18.

Finally, Mr. Dunning's appearance on June 15, 1981, was only for the special purpose of enabling Mrs. Dunning's counsel to continue a hearing date so that settlement talks might continue. That presence cannot be viewed as a general appearance in the matter and the Superior Court made such a finding in its Notice of Intended Decision filed September 29, 1981.

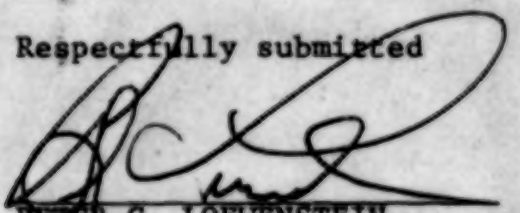
II. The Decision of the California Supreme Court in Denying a Hearing in this Case Has Left Intact a Lower Court Decision which Effectively Destroys All Limits of Personal Jurisdiction in Domestic Relations Cases.

If California were allowed to have personal jurisdiction over Mr. Dunning, basic fairness and reason would be offended and the limits of personal jurisdiction imposed by the Due Process Clause of the Fourteenth Amendment as defined in Kulko, International Shoe, and Hanson would be violated. Such a holding would confer personal jurisdiction upon the Courts of California in virtually every domestic relations case where one spouse lives in California regardless of where the other spouse lives and regardless of where the couple lived during their marriage. Certainly, there is no case which has extended the limits of jurisdiction this far.

Conclusion

For the foregoing reasons a Writ of Certiorari should issue to review the order and opinion of the Contra Costa County Superior Court, State of California, and this Court should temporarily stay any further proceedings by the California courts.

Respectfully submitted



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APPENDIX

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FILED
Sept. 29, 1981

J. R. Olsson
Clerk

IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF CONTRA COSTA

In re the marriage of Petitioner: PATRICIA M. DUNNING and Respondent: HOWARD C. DUNNING	NO. 219703 NOTICE OF INTENDED DECISION

The Court finds that respondent's in propria personna appearance on June 15, 1981 did not amount to a general appearance so as to abrogate his ability to challenge jurisdiction herein. However, respondent's motion is unclear regarding the portions of the action attacked, and virtually no facts in support of either position are stated by either party (except for a brief oral statement by counsel that the parties lived

together in Canada and on separation one moved to California and one to Colorado). Thus, the Court reserves judgment on respondent's motion pending further proceedings.

Dated: September 28, 1981.

JAMES H. LIBBEY
Commissioner - Judge Pro Tem

FILED
February 9, 1982

J. R. Olsson
Clerk

SUPERIOR COURT OF CALIFORNIA

COUNTY OF CONTRA COSTA

Petitioner: PATRICIA M. DUNNING and Respondent: HOWARD CLAYTON DUNNING	NO. 219703 ORDER AFTER HEARING RE MOTION TO QUASH

This proceeding came on for hearing on September 24, 1981 in the Family Law Department before Judge James Libbey. Attorney for Petitioner, ROBERT D. McGUINESS and Attorney for Respondent, PETER G. LOEWENSTEIN, were present in Court.

On the Motion filed September 24, 1981 by respondent,

IT IS ORDERED pending trial or until further order of this court that

Respondent's motion to quash is denied.

Dated February 9, 1982.

JAMES H. LIBBEY
Judge of the Superior
Court

FILED
April 27, 1982

Clifford C. Porter
Clerk

COURT OF APPEAL
OF THE
STATE OF CALIFORNIA
IN AND FOR THE
FIRST APPELLATE DISTRICT

DIVISION ONE

HOWARD CLAYTON DUNNING,

Petitioner,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF CONTRA COSTA,	)	NO. A016097 Superior Court No. 219703
Respondent,	)	
Patricia M. Dunning, Real Party in Interest.	)	

BY THE COURT:

The petition for writ of mandate and request for stay of all proceedings is denied.

Dated: April 27, 1982.

_____ P.J.

5 App.

CLERK'S OFFICE, SUPREME COURT
4250 State Building

San Francisco, California 94102

June 16, 1982

I have this day filed Order

HEARING DENIED

In re: 1 District No. A016097

Howard Clayton Dunning

vs.

Superior Court/Contra Costa
(Patricia M. Dunning)

Respectfully,

Clerk